IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 14, 2005 Session

IN RE C.L.M.

Appeal from the Juvenile Court for Davidson County
No. 2003-000735 Betty Adams Green, Judge

No. M2004-02922-COA-R3-PT - Filed March 30, 2006

Natural mother brings this appeal from the juvenile court's termination of her parental rights as to the minor child, C.L.M. The sole challenge to the court's order is that, due to alleged insufficiency of process, the trial court lacked personal jurisdiction over her such that the termination of her parental rights amounted to a violation of due process. We affirm the action of the trial court.

Tenn. R. App. P. 3 Appeal as or Right; Judgment of the Juvenile Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

J. Stephen Mills, Nashville, Tennessee, for the appellant, K.D.M.

Paul G. Summers, Attorney General and Reporter; Dianne Stamey Dycus, Deputy Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

The natural mother brings this appeal from the juvenile court's termination of her parental rights on the Department of Children's Services' ("the State") petition. On appeal the mother argues that she did not receive adequate notice of the termination proceeding. The petition, which appears in the technical record accompanied by a cover letter dated May 4, 2004, averred in its certificate of service that a copy of the petition was delivered to the following via Juvenile Court Mail, hand delivery, or U.S. Mail on this the 10th day of May, 2004:

Juvenile Court:
Dennis Nordhoff, GAL
Steve Holzaphel, mother's attorney
100 Woodland Street
Nashville, TN 37213

Hand Delivery:
Marie Lee, DCS Case Manager
900 Second Avenue North
Nashville, TN 37243

U.S.Mail:
[K.M.], mother
c/o Kimberly Lynn Willey
Mental Health Co-op Apt 1320
301 – 28th Avenue North
Nashville, TN 37203
And
4873 Popper Dam Creek Drive
North Charleston, SC 49218

Seth Cart
General Delivery
Bon Aqua, TN 37025

It is undisputed that at the time the petition was filed, the 4873 Popper Dam Creek Drive address was the last known address for the respondent. However, at the same time the State filed its Petition to Terminate, it filed a Motion to Ascertain Status of Service for Publication and to Set for Trial. Although a copy of the motion appears in the record, no order appears disposing of that motion. Likewise, no proof of notice by publication appears in the record. The transcript from the termination hearing does reflect that, despite these apparent defects, Attorney Steve Holzapfel appeared in court on the mother's behalf. The petition was heard on September 10, 2004. In the interim, the State had contact with the mother at the Family Restaurant in Madison, Tennessee, in July of 2004. A month later the mother had left that place of employment. As of the September hearing, the mother's whereabouts were still unknown. Mother made no challenge to service *pro se* or through counsel prior to or during the September hearing. The issue was raised for the first time on appeal. The appellant's argument hinges upon the following statement from this Court's opinion in *In Re: Z.J.S. and M.J.P.*:

> Service of a biological parent in accordance with Tenn. R. Juv. P. 10(c) is not a mere perfunctory act undertaken simply to satisfy the technicalities of some statute. It has constitutional dimensions. *See In re Baby Girl B*, 618 A.2d 1, 17 (Conn.1992). Due process requires plaintiffs to give defendants notice that is reasonably calculated, under all the circumstances, to inform the defendants of the pending action. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798, 103 S.Ct. 2706, 2711 (1983); *McClellan v. Board of Regents*, 921 S.W.2d 684, 688 (Tenn.1996); *Karr v. Gibson*, No.01A01-9605-CH-00220, 1998 WL 57536, at *2 (Tenn.Ct.App. Feb.13, 1998) (No Tenn. R.App. P. 11 application filed). As the United States Supreme

> Court has made clear: "[t]he means employed [to give notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.306, 315, 70 S.Ct. 652, 657 (1950).

In re Z.J.S. and M.J.P., No. M2002-02235-COA-R3-JV, 2003 WL 21266854, *6 (Tenn.Ct.App. June 3, 2003).

For its part, the State argues that the mother waived her right to challenge service on appeal, and that, in the alternative, the service certificates provide proof from which the finder of fact may infer adequate notice consistent with the demands of due process. In determining the controversy before us, we are guided in the first instance by another portion of our opinion in *In re Z.J.S*:

> The type of notice required depends on the facts of each case regarding both the identity and the whereabouts of the biological parent and the diligence of the Department's efforts to ascertain both the identity and the whereabouts of the biological parent. Because of the significant constitutional interests at stake, the need for finality in termination cases, and risk of collateral attacks on adoption proceedings by biological parents whose rights were terminated without notice, the Department and others seeking to terminate a biological parent's parental rights should take all reasonably available steps to assure that a biological parent has actual notice of the termination proceeding. Notice by publication, without more, should be the alternative of last resort. *See In re Baby Girl*, 618 A.2d at 17.

In Re: Z.J.S, at *6.

In re Baby Girl B, an appeal from Connecticut's Superior Court in the judicial district of New Haven, juvenile matters, addresses the reopening of a proceeding terminating parental rights. The Connecticut Supreme Court heard two challenges to the trial court's decision to reopen the proceeding, in which the natural mother, an 18-year-old high school student concealed her identity from hospital personnel. She had collapsed on the street and was taken to the hospital by ambulance. Hospital personnel delivered her child. Shortly after the delivery, the mother left the hospital without ever having identified herself to Connecticut youth services personnel. The record before the court in the original termination proceeding contained the name, address and phone number of the individual who had called 911 when the mother collapsed. Nevertheless, Connecticut DCYS personnel did not track down the individual. The court never considered appointing counsel for the absentee mother, and never attempted to identify or locate her. In a lengthy opinion affirming the trial court's decision to reopen the proceeding under a particular section of Connecticut statutory law, Conn. Gen. St. § 212a, the court said:

> We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion.

Gillis v. Gillis, 214 Conn. 336, 340-41, 572 A.2d 323 (1990); *Celanese Fiber v. Pic Yarns, Inc.*, 184 Conn. 461, 467, 440 A.2d 159 (1981). On the limited record before us, we find no abuse of discretion.

. . .

We note, furthermore, that the trial court's ruling finds additional support in the cramped circumstances of the original proceedings for the termination of the mother's rights. Notice by publication, although sometimes necessary, is not the preferred method for assuring full participation in so significant an impairment of constitutionally protected parental rights. *See Santosky v. Kramer*, supra. The purpose of the notice in this case was to inform the mother of the hearing regarding the termination of her parental rights. Notice is not a mere perfunctory act in order to satisfy the technicalities of a statute, but has, as its basis, constitutional dimensions. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).[FN21]

FN21. Although none of the parties has raised an issue relating to the notice of the original proceedings provided to the mother, we note that DCYS's efforts to locate the mother were minimal. The record indicates that the application for order of notice by publication fails to cite any fact that would indicate that reasonable efforts were made to locate the child's mother or father. Indeed, the petition upon which the trial court acted merely indicates the residence an "unknown." Furthermore, the only evidence that DCYS presented at the hearing for the coterminous petitions in regard to its efforts to locate the mother was described by Polverari as follows: "I made a report to the West Haven Police Department. I gave them the information that was taped on the 911 conversation, there was a gentlemen's name, the man who called, and they swore that they would make contact with him and see if there was any relationship. So, we made every attempt that we would have." Surely, it is implicit in General Statutes § 45a-716, which authorizes service by publication, that DCYS is required to make a reasonable effort to locate the parents of the child and that the record indicate theses efforts prior to granting a petition for termination of parental rights. To interpret § 45a-716 to require anything less would jeopardize the constitutionality of the statute.

In re Baby Girl B, 618 A.2d 1, at 17 (Conn. 1992).

This opinion has limited application in its own jurisdiction. It is likewise distinguished on the facts from the instant case in which the mother is represented by counsel and was so represented at trial. At the core of any challenge as to the sufficiency of service, especially in cases wherein the State is the petitioner, is the concern that constitutional requirements of due process have been satisfied. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 70 S.Ct. 652, 657 (1950); *see also Mennonite Bd. of Missions*, 462 U.S. 791, 798, 103 S.Ct. 2706, 2711 (1983). According to the due process test espoused in *Mullane* and its progeny, there must be some means of determining whether "under the circumstances of a particular case" the means of service exercised by the government are such as one would likely use who means actually to inform the defendant of a pending action. *Mullane,* 339 U.S. at 315. Our civil procedure rules set forth the means by which this test is generally applied. *See* Tenn. R. Civ. P. 12. In civil actions as well as juvenile court

actions it is incumbent upon the person challenging the sufficiency of process to raise its challenge at the first opportunity in a motion to dismiss. It is likewise possible for a defendant, by failing to file such a motion and making a formal appearance on the record, to thereby waive any right to challenge the mode of service regardless of the inherent due process concerns. *See* Tenn. R. Juv. P. 10(d); *see also* Tenn. R. Civ. P. 12.08.

According to the transcript, Stephen Holzapfel appeared on the mother's behalf at trial:

> THE COURT: This is the matter of [C.L.M.]. I believe we're here on the Department's petition to terminate parental rights. I think that's correct. Mother is [K.M.] and –
> MS. MAYES: And [S.C.], the alleged father and unknown father, you will need to reserve their rights and allow publication to proceed.
> THE COURT: All right. And here comes Mr. Nordhoff. He is the – is the guardian ad litem –
> MR. NORDHOFF: Yes.
> THE COURT: – of this child, I believe and Mr. Holzapfel, you represent the mother –
> MR. HOLZAPFEL: Yes, ma'am.
> THE COURT: – [K.M.].
> MR. HOLZAPFEL: Yes, ma'am.

Mr. Holzapfel's statements are corroborated elsewhere in the evidentiary record. The Agreed Order of Adjudication and Disposition entered June 6, 2003 recites that the parties appeared before the court voicing their agreement in determining the dependency and neglect of the minor child and to supply substitute visitation for the mother to compensate for a missed visit prior to the entry of order:

> This cause came on to be heard the 19th day of May of 2003 before the Honorable J. Michael O'Neil, Referee of the Juvenile Court of Davidson County, Tennessee for Settlement on the Department of Children's Services Petition for Custody with Request for Emergency Removal filed by the Department on April 2, 2003.
>
> Present in the Court were [K.M], Mother; Stephen Holzapfel, Attorney for the Mother; Dennis Nordhoff, GAL for the child; Kendra Clark and Marie Lee, Case Managers for the Department;and Julie Ottman, Counsel for the Department.

Likewise, the permanency plan staffed within days after the emergency order of removal listed Stephen Holzapfel as counsel for the mother whose whereabouts were unknown. Rule 19 of the Tennessee Rules of Juvenile Procedure provides the following with regard to the continued representation of counsel:

> **(a) Entry of Appearance.** An attorney who undertakes to represent a party in any juvenile court action shall immediately notify the court,

> unless appointed by written order of the court. For the purpose of this rule, the filing of any pleading signed by an attorney constitutes an entry of appearance.
> **(b) Continued Representation.** An attorney who has entered an appearance or who has been appointed by the court shall continue such representation until relieved by the court.

Tenn. R. Juv. P. 19

Mr. Holzapfel did not file a motion to withdraw until a month after the hearing on the State's petition. In the meantime, his client had filed her own notice of appeal to circuit court.[1] Subsequently, a second notice of appeal was filed in the trial court which resulted in new court appointed counsel. Nevertheless, prior to the entry of the order granting Mr. Holzapfel's motion to withdraw, Mr. Holzapfel continued to represent the respondent. Service of process in Juvenile Court is governed by rule 10 of the Juvenile Procedure Rules:

> **(c) Service of Summons.**
> (1) If a party to be served with a summons is within this state and can be found, the summons shall be served upon the party personally at least three (3) days before the hearing. If the party is within this state and cannot be found, but the party's address is known or can with reasonable diligence be ascertained, the summons may be served upon the party by mailing a copy by registered or certified mail at least five (5) days before the hearing. If the party is without this state but can be found or the party's address ascertained, service of the summons may be made either by delivering a copy to the party personally or by mailing a copy to the party by registered or certified mail at least five (5) days before the hearing.
> (2) If after reasonable effort the party cannot be found or the party's post office address ascertained, whether the party is within or without this state, the court may order service of the summons upon the party by publication in accordance with T.C.A. §§ 21-1-203 and 21-1-204. The hearing shall not be earlier than five (5) days after the date of the last publication.
> (3) Service of the summons may be made by any suitable person under the direction of the court.
> (4) The court may authorize the payment of the costs of service and of necessary travel expenses incurred by persons summoned or otherwise required to appear at the hearing, as provided by law.

[1] For reasons undisclosed in the record, the final order granting the State's petition was not entered until December 2004, almost three months from the hearing on the State's petition and seven months from the filing of the petition to terminate the mother's rights.

> **(d) Waiver of Service.** A party other than a child may waive service of summons by written stipulation or voluntary appearance. A child may waive service of summons in accordance with Rule 30(d) of these rules.

Tenn. R. Juv. P.10

Since the legislature has provided concurrent jurisdiction over termination of parental rights cases in Circuit, Chancery and Juvenile Courts, certain provisions of the Rules of Civil Procedure not in conflict with the Juvenile Rules govern proceedings in the Juvenile Court as well. *See Gonzalez v. State Dept. Of Children's Serv's*, 136 S.W.3d 613, 617 (Tenn. 2004). Mr. Holzapfel made a formal appearance on his client's behalf. It also bears noting that each certificate of service which bears at least one last known address of the respondent mother bears also the address of Stephen Holzapfel, counsel for the respondent.

The measures taken by the Department to achieve service of process in a parental rights termination proceeding must not be a perfunctory exercise, but they need not be the heroic turning over of every stone under which the respondent might possibly be found. Under the guidance of *Mullane*, the actions need only be those reasonably calculated under the circumstances of the entire case to reach the respondent and inform her of the pending action. The record as presented to us by the appellant shows that the State took those reasonable steps. We hold that the appearance of appointed counsel waives the right of the respondent to challenge the sufficiency of process. The due process argument advanced by the respondent is unpersuasive.

The action of the trial court is affirmed in all respects, and costs are taxed against the State.

_____

WILLIAM B. CAIN, JUDGE